FILE COPY

FILED
FEB 5 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1081

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

vs.

WASHINGTON TERMINAL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia Circuit

HAROLD A. ROSS
1548 Standard Building
Cleveland, Ohio 44113

E. VICTOR WILLETTE, JR.
E. P. BAKER
1209 Ring Building
1200 Eighteenth Street, N.W.
Washington, D. C. 20036

Counsel for Petitioner

Of Counsel:

ROSS & KRAUSHAAR
1548 Standard Building
Cleveland, Ohio 44113

SCHINNER, HALL, THORNBURG & THOMPSON
1209 Ring Building
1200 Eighteenth Street, N.W.
Washington, D. C. 20036

THE BYRD LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 861-8647



TABLE OF CONTENTS

Opinions Below ---------- 1

Jurisdiction ---------- 2

Questions Presented ---------- 2

Statutes Involved ---------- 3

Statement ---------- 4

Reasons for Granting the Writ ---------- 11

Conclusion ---------- 31

APPENDIX (Attached):

A. Opinion of the United States Court of Appeals for the District of Columbia Circuit ---------- A1

B. Judgment of the Court of Appeals ---------- A41

C. Findings, Conclusions and Order of District Court ---------- A42

D. Public Law 91-226; 84 Stat. 118 ---------- A45

Excerpts from the Railway Labor Act ---------- A47

E. Letter of Petitioner to National Railroad Adjustment Board ---------- A56

TABLE OF AUTHORITIES

Cases

Butte, A. & P. Ry. Co. v. Locomotive Firemen & Eng., 268 F.2d 54 (9th Cir. 1959), *cert. denied*, 361 U.S. 864 (1959) ---- 22-23

Chicago & N. W. R. Co. v. United Transp. Union, 402 U.S. 570 (1971) ---- 11, 12, 15, 16, 29

Detroit & T. S. L. R. Co. v. United Transp. Union, 396 U.S. 158 ---- 20

Detroit & Toledo Shore Line R. Co. v. Locomotive Firemen & Eng., 396 U.S. 142 (1969) ---- 11, 15, 19, 20, 22, 24

Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711 (1945) ---- 13

Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964) ---- 16

Glover v. St. Louis-S.F. Ry. Co., 393 U.S. 324 (1969) 20

Illinois Central R. Co. v. Locomotive Engineers, 422 F.2d 593 (7th Cir. 1970) ---- 25

Illinois Central R. Co. v. Locomotive Engineers, 443 F.2d 136 (7th Cir. 1971) ---- 17

Int'l. Ass'n. of Machinists v. Nat'l. Ry. Labor Conf., 310 F. Supp. 904 (D.D.C. 1970) ---- 8

Locomotive Engineers v. Denver & R. G. W. R. Co., 411 F.2d 1115 (10th Cir. 1969) ---- 20

Locomotive Engineers, Div. 700 v. Arbitration Bd. 282, 223 F. Supp. 377, 244 F. Supp. 336 (D.D.C. 1963) ---- 26

Locomotive Firemen v. Detroit & T. S. L. R. Co., 421 F.2d 660 (6th Cir. 1970), *cert. denied*, 398 U.S. 927 (1970) ---- 21

Machinists v. Nat'l Ry. Labor Conf., 310 F. Supp. 905 (D.D.C. 1970) ---- 6

Manning v. American Airlines, 329 F.2d 32 (2d Cir. 1964), cert. denied, 379 U.S. 817 (1964) ---- 25

BLEED THROUGH POOR COPY

NLRB v. C & C Plywood Corp., 385 U.S. 421 (1966) ---- 17, 20

NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967) ---- 24

NLRB v. Insurance Agents Int'l., 361 U.S. 477 (1960) ---- 21, 30

NLRB v. Katz, 369 U.S. 736 (1962) ---- 16, 19

NLRB v. Lion Oil Co., 352 U.S. 282 (1956) ---- 14

Railway Clerks v. Florida E. C. R. Co., 384 U.S. 238 (1966) ---- 19

Railway Conductors & Brake. v. Spokane, P. & S. Ry. Co., 366 F.2d 99 (9th Cir. 1966), cert. denied, 385 U.S. 1025 (1966) ---- 22

Railroad Telegraphers v. Chicago & N. W. Ry. Co., 362 U.S. 330 (1960) ---- 21

Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) ---- 15, 16

Rolfes v. Dwellingham, 198 F.2d 591 (8th Cir. 1952) ---- 23-24

Rutland Ry. Co. v. Locomotive Engineers, 307 F.2d 21 (2nd Cir. 1962) ---- 19

Seaboard World Airlines v. Transport Workers, 425 F.2d 1086 (2d Cir. 1970) ---- 26

Southern Pacific Transp. Co. v. Int'l. Broth. of Electrical Workers, Civil No. S-1699 (E.D. Cal. 1970) ---- 10

Standard Oil Co. (Ohio), 174 NLRB No. 33 (1969) ---- 28

Terminal R.R. Ass'n v. Railroad Trainmen, 318 U.S. 1 (1943) ---- 21

Texas & N. O. R. Co. v. Railway Clerks, 281 U.S. 548 (1929) ---- 20

Unit Drop Forge Div., Eaton, Yale & Towne, 171 NLRB No. 73 (1968) *enforced*, 412 F.2d 108 (7th Cir. 1969) ---- 27

United Industrial Workers v. Galveston Wharves, 351 F.2d 183 (5th Cir. 1965) ---------- 13, 24

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) ---------- 20

United Transp. Union, Local 63E v. Penn Central Co., 443 F.2d 131 (6th Cir. 1971), cert. denied, 404 U.S. 938 (1971) ---------- 22

Virginian Ry. v. System Fed., 300 U.S. 515 (1937) ---- 20

Statutes

National Labor Relations Act (29 U.S.C. § 151) ---- 17

Public Law 88-108 ---------- 21

Public Law 91-203, 84 Stat. 22 ---------- 8

Public Law 91-226, 84 Stat. 118 ---------- 2, 3, 4, 8, 10, 14, 18, 20, 21, 23

Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ---------- 12

Sec. 2, First ---------- 3, 11, 12, 16, 21, 24, 26, 29

Sec. 2, Seventh ---- 3, 9, 13, 15, 16, 21, 22, 24, 29

Sec. 3, First ---------- 12

Sec. 6 ---------- 3, 5, 13, 15, 16, 18, 21, 22, 24, 25, 29

Sec. 10 ---------- 6

28 U.S.C. § 1254 (1) ---------- 2

Other

Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1110-1116 (1950) 28

Harper, *Major Disputes Under the Railway Labor Act*, 35 J. AIR L & COMM. 3, 16-17 (1969) 13

Hearings, House Comm. on Interstate and Foreign Commerce, H. J. Res. 1112, 91st Cong. 2nd Sess. (1970) 9

Hearings, Senate Comm. on Labor and Public Welfare, S. J. Res. 178, 91st Cong. 2nd Sess. (1970) 9

NLRB, 29th Ann. Rep. (1964) pp. 78-79 28

NLRB, 30th Ann. Rep. (1965), pp. 77-78 28

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ----------.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

vs.

WASHINGTON TERMINAL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia Circuit

Petitioner, International Brotherhood of Electrical Workers, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on December 19, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A, *infra,* pp. A1-A40, and is not yet officially reported. The findings of fact, conclusions of law and order of the United States District Court for the District of Columbia (Appendix C, pp. A42-A44, *infra*) are unreported.

JURISDICTION

The judgment of the Court of Appeals, set forth in Appendix B, *infra*, p. A41, was entered on December 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

On December 4, 1969, negotiators for four unions, including petitioner as bargaining agent for the craft of electrical workers, initialed a memorandum as the possible basis for resolving a wage and rules dispute with the nation's railroads. Among other things, the memorandum, which was subject to ratification and ultimately rejected by the membership of one of the unions, proposed a new work rule permitting mechanics to perform as part of their main job assignment "incidental work" normally performed by mechanics of the other crafts involved in the proposed settlement. The understanding also required the carriers to withdraw their demands for rule changes, including the creating of a composite mechanic, and to waive for a prescribed time the right to demand any further bargaining on those subjects. To prevent a nation-wide rail strike by four unions, Public Law 91-226 was enacted on April 9, 1970, to provide that said memorandum would "have the same effect (including the preclusion to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act." Although the basic collective agreement in effect since 1946 prohibited the railroad from using any employees other than electricians to perform any work in that craft, the railroad, several months after passage of the statute, began to use employees in crafts other than those represented by the four unions initialing the memorandum and designated as parties thereto in Public Law 91-226 to perform electrical work

BLEED THROUGH POOR COPY

incidental to a major assignment. The questions presented are:

1) Do Sections 2, Seventh and 6 of the Railway Labor Act (45 U.S.C. §§ 152, Seventh, and 156) prohibit the railroad from unilaterally changing major conditions of employment by extending the terms of an understanding, placed into effect by Public Law 91-226, to encompass crafts which were not parties to the understanding or designated as such in the Statute?

2) Having withdrawn and waived its demand for a composite mechanic, did the railroad violate Section 2, First of the Railway Labor Act (45 U.S.C. § 152, First), which requires the parties to maintain agreements and to bargain in good faith, when it subsequently extended the terms of the incidental work rule to crafts that were not party to the understanding or designated as such in Public Law 91-226, thereby creating a composite mechanic as to incidental work?

STATUTES INVOLVED

The statutes principally involved are Sections 2, First and Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, First and Seventh, and 156 (44 Stat. 577, as amended), and Public Law 91-226 (84 Stat. 118, amending 44 Stat. 577). These provisions, along with other pertinent parts of the Railway Labor Act are printed in Appendix D hereto, pp. A45-A55, *infra*.

STATEMENT

The International Brotherhood of Electrical Workers (IBEW), the petitioner herein, instituted this action for a declaration of the rights of the parties under Public Law 91-226, and for an injunction requiring the Washington Terminal Company (Terminal) to maintain those rules and working conditions of its employees in effect prior to April 9, 1970, except insofar as Public Law 91-226 permitted the railroad to use employees in the three other crafts covered by said law to perform incidental work in the craft represented by IBEW, until such time as the notice and negotiation procedures of the Railway Labor Act had been exhausted. The complaint alleged, *inter alia*, that the railroad had violated the notice and negotiation provisions of the Act and had engaged in bad faith bargaining through its unilateral changes in working conditions (J.A. 5-6, 7),[1] as well as improperly extending Public Law 91-226 beyond the class of persons designated within its coverage (J.A. 8-10). The district court denied IBEW's motion for a preliminary injunction, and the court of appeals affirmed. IBEW now seeks review by this Court.

Since at least June 16, 1946, Terminal has had a collective bargaining agreement with Railway Employes' Department, System Federation No. 106 (J.A. 38). IBEW, the International Association of Machinists and Aerospace Workers (IAM), the International Brotherhood of Boilermakers and Blacksmiths (IBBB), the Sheet Metal Workers International Association (SMWI), and the Brotherhood of Railway Carmen (BRC) are parties to the basic agreement, and along with the International Brotherhood

---

[1] Joint Appendix in the court below.

BLEED THROUGH POOR COPY

of Firemen and Oilers (IBFO), make up the System Federation. [2]

Said agreement provides for separate seniority rosters in each craft and for certain classes of employees in each craft, and prohibits Terminal from performing the work of any craft represented by a signatory to the agreement with persons who are not members of that craft and do not hold seniority therein. [3] Up to the time of the present dispute, Terminal did not use employees in any craft other than that of electrical workers represented by IBEW to perform electrical work (J.A. 4, 38).

On November 8, 1968, IBEW, through its General Chairman, served a Section 6 Notice (45 U.S.C. § 156) on Terminal, which demand solely related to rates of pay (J.A. 6, 14-16). Identical notices were separately served by representatives of IAM, IBBB and SMWI, each suggesting the notices should be handled jointly at a national level for all carriers involved and the four unions in the event agreement with Terminal could not be reached [4] (J.A. 8, 12-13).

On November 26, 1968, Terminal, as well as most of the nation's railroads, served a joint notice on the representatives of the four unions (J.A. 8, 16). This notice

---

[2] IBEW is bargaining representative for the craft of electrical workers on Terminal; IAM, craft of machinists; IBBB, crafts of boilermakers and blacksmiths; SMWI, craft of sheet metal workers; and BRC, craft of carmen.

[3] Rule 27 of the System Federal Agreement reads in pertinent part: "None but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft." (J.A. 3). Mechanics' work of electricians is specifically set out in Rule 62 (Electrical Workers Special Rules) (J.A. 4).

[4] In view of the fact that BRC and IBFO had elected to progress and bargain separately on their own different demands, which they did subsequently do, the Executive Council of the Railway Employes' Department decided IAM, IBEW, IBBB and SMWI "would proceed as a unit to progress [the November 8, 1968] notice to a conclusion excluding the other two organizations forming" the Department (J.A. 42).

proposed, among other things, to create a composite mechanic by eliminating all rules or practices prohibiting the use of any of the employees involved to perform work in a craft in which he did not have seniority, and further to merge all classifications of work into one classification in order that the carrier could assign any work to be "performed by any employee of the class to which the rule is applicable irrespective of craft." (J.A. 20).

Since no agreements were reached with any individual carriers, including Terminal, negotiations took place at the national level involving only the four unions serving those notices (J.A. 42, 43). Subsequently, the railroads and the four unions were unable to settle their dispute; the National Mediation Board was unsuccessful in obtaining agreement through its mediatory services; and the recommendations of Presidential Emergency Board No. 176 failed to yield a settlement. See *Machinists v. Nat'l. Ry. Labor Conf.*, 310 F. Supp. 905 (D.D.C. 1970).

Through the mediatory efforts of the Emergency Board, and later the Department of Labor, a so-called incidental work rule began to be discussed, which had as its purpose the slight modification of work rules to partially obscure the classifications between mechanics who were machinists, electricians, boilermakers, blacksmiths and sheetmetal workers (J.A. 43-44).

In an effort to achieve a settlement within the 30-day "cooling-off" period provided in Section 10 of the Act (45 U.S.C. § 160), marathon negotiating sessions were held, out of which the parties reached an understanding reflected in a memorandum initialed by the parties on December 4, 1969. This document included the incidental work rule (J.A. 44).

The understanding did not contain explicit or formal contract language (J.A. 44).[5] It did specify certain wage

[5] In addition, as the chief negotiator for the unions, IAM Vice-President William W. Winpisinger, stated:

BLEED THROUGH, POOR COPY

increases to the employees and also included special wage increases "applicable to mechanics only" (J.A. 22-23). The memorandum also referred to certain "rules changes effective as of the date of notification of ratification of the agreement," which included the "incidental service rule" set forth in an attachment No. 1. In relevant part, the incidental work rule says:

> ". . . At running repair work locations which are not designated as outlying points where a mechanic or mechanics of a craft or crafts are performing a work assignment, the completion of which calls for the performance of 'incidental work' (as hereinafter defined) covered by the classification of work rules of another craft or crafts, such mechanic or mechanics may be required, so far as they are capable, to perform such incidental work provided it does not comprise a predominant part of the total amount of work involved in the assignment."

Attachment No. 4 stated that the finalized agreement would be one between each of the carriers, including Terminal, and "its employees represented by the organizations signatory hereto." No organization, other than IAM, IBEW, IBBB and SMWI initialed the memorandum. This attachment further provided that the agreement would be in settlement of the dispute growing out of both sets of notices, would require the carriers to withdraw their pending notices on any subject referred to in the understanding, and would prohibit the parties from serving any section 6 notice for the purpose of changing those provisions, or relating to the subject matter therein, until September 1, 1970.

(Continued from previous page)

"At no time was it ever indicated that the rule would apply to any but the crafts represented by the four organizations. In view of Attachment No. 4 [a moratorium and effect of agreement provision], the carriers could not take any action to modify the disposition reached on the subject . . ." (J.A. 44).

Since the memorandum was not self-executing and required ratification by the members of the four unions, the initialing of the understanding did not terminate the dispute. A majority of SMWI later rejected the understanding (J.A. 44).

On January 31, 1971, a selective strike by the four unions against the Union Pacific and the railroads' threatened retaliatory nationwide lockout were temporarily restrained. After various extensions, a preliminary injunction against selective strikes was issued on March 2, 1970. *Int'l. Ass'n. of Machinists v. Nat'l. Ry. Labor Conf.*, 310 F. Supp. 904 (D.D.C. 1970). During this period, the IBEW, IAM and IBBB tendered an offer to accept the understanding without SMWI. This offer was summarily rejected by the carriers on the basis that SMWI had to be included. And a follow-up offer to substitute the BRC was likewise rejected on the ground that the special increase of 17 cents per hour to the mechanics involved in the dispute had been computed solely on the participation of *the four* organizations (J.A. 45).

The unions' announced intention to commence a nationwide strike on March 4, 1970. was postponed by enactment of Public Law 91-203, 84 Stat. 22, on that date.

As the parties ultimately reached a definite impasse, a potential nationwide rail strike was averted when, on April 9, 1970, Congress enacted Senate Joint Resolution 190, Public Law 91-226, 84 Stat. 118. The Joint Resolution referred to the outstanding labor dispute between the carriers represented by the National Railway Labor Conference including Terminal, and the four unions, and is set up at pp. A45-A46, *infra*.[6] Public Law 91-226 provided:

---

[6] Throughout the history of the legislation, it was apparent Congress and the railroads, which advocated passage of the bill, considered the proposed statutory enactment and memorandum as applying only to the four organizations, and that, through the

(Footnote continued on following page)

BLEED THROUGH POOR COPY

"The memorandum of understanding, dated December 4, 1969, shall have the same effect, (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act."

Except as to the interplay between the parties designated in the understanding, the restrictive rules in the System Federation agreement continued in effect; and until the first part of May, 1970, Terminal did not use employees in crafts other than those represented by the four organizations to perform incidental work in the craft of electrical workers.

On May 29, 1970, IBEW, through its General Chairman, advised Terminal that its use of employees from crafts other than represented by the four unions to perform incidental electrical work violated Section 2, Seventh of the Railway Labor Act, and threatened to strike unless the unilateral acts were stopped (J.A. 12). Thereupon,

---

(Continued from previous page)

statute, Congress was placing into effect a binding contract between the carriers and only the employees represented by those four unions. Hearings, House Comm. on Interstate and Foreign Commerce, H. J. Res. 1112, 91st Cong. 2nd Sess. (1970), p. 9; Hearings, Senate Comm. on Labor and Public Welfare, S. J. Res. 178, 91st Cong. 2nd Sess. (1970), Vol. I, pp. 92-93. Likewise, the carriers' chief negotiator repeatedly emphasized that the special wage increase had been attached to the rule on the basis of participation of the four unions, and that less than four would require a reduction in the amount offered. House Comm. Hearings, *supra*, pp. 245, 247; Senate Comm. Hearings, *supra*, Vol. II, pp. 118, 119. Logically, it follows that the amount of the increase would have necessarily been greater if the rule contemplated its automatic extension to a fifth or sixth union. Moreover, contrary to the preview of the rule made by the lower court (pp. A20-A22, *infra*), the carriers' negotiator in other litigation and before Congress explicitly testified: "Under the incidental work rule, *members of each of the crafts involved in this dispute* would be permitted to perform work within the scope of one of the other crafts' classification of work rules in certain circumstances when such work is incidental to the mechanic's [obviously of the four crafts] main job." House Comm. Hearings, *supra*, p. 245 (Emphasis supplied).

Terminal did discontinue its actions subject to a meeting of the national negotiators, who had initialed the understanding (J.A. 40).[7]

At this conference, held on July 8, 1970, the railroad's national negotiator took the position that the understanding, as effectuated by Public Law 91-226, could be arbitrarily extended to encompass crafts of employees whose bargaining representatives were not party thereto (J.A. 36-37). In light of this adamant position, Terminal did on August 4, 1970, again alter the rules and working conditions for the craft of electrical workers, and has continued to use employees in crafts other than those represented by IBEW, IAM, IBBB or SMWI to perform electrical work on that carrier's equipment (J.A. 40, 41).

The district court refused to enjoin Terminal, because (1) Congress intended through Public Law 91-226 that

---

[7] About the same time that Terminal rescinded its action, the Southern Pacific Transportation Company instituted a similar program. Unable to resolve the problem, IBEW notified that carrier and the National Mediation Board that a strike would take place on June 29, 1970 (J.A. 66). On that date, the United States District Court for the Eastern District of California issued an order prohibiting the strike, and on July 9, 1970, granted Southern Pacific a preliminary injunction. *Southern Pacific Transp. Co. v. Int'l. Broth. of Electrical Workers*, Civil No. S-1699 (E.D. Cal. 1970) (J.A. 66-69). As a condition for issuance of the injunction, Southern Pacific was required to submit the dispute to the Adjustment Board within five days, which it did do. On July 31, 1970, IBEW sent to the Board a letter in the nature of a motion to dismiss for lack of jurisdiction (See Appendix E, pp. A56-A58, *infra*). To date, no response has been made on that request, nor has the Mediation Board taken any action on IBEW's invocation of its services.

On August 7, 1970, IBEW filed a notice of appeal docketed as No. 26,696 in the Court of Appeals for the Ninth Circuit. Prior to filing said notice, IBEW filed on July 31, 1970, an answer and counterclaim, which was virtually a verbatim copy of the complaint in this action. On October 5, 1970, that district court denied the relief requested, and entered a written order on November 4. IBEW appealed from the order denying its counterclaim, which appeal was docketed as No. 71-1390 in the Ninth Circuit. The cases were consolidated for argument. On January 23, 1973, without independent discussion, the Ninth Circuit affirmed *per curiam*, citing the determination below.

BLEED THROUGH POOR COPY

the understanding be applied "across the board" to all mechanics of all crafts; (2) the dispute was minor and therefore within the jurisdiction of the National Railroad Adjustment Board; and (3) the action taken by the district court in the Southern Pacific case was persuasive authority (J.A. 73-76). The Court of Appeals affirmed on the ground that "the dispute is one which should be resolved under the 'minor dispute' procedures of the Railway Labor Act" (p. A18, *infra*).

IBEW now seeks review by this Court.

REASONS FOR GRANTING THE WRIT

In *Detroit & Toledo Shore Line R. Co. v. Locomotive Firemen & Eng.*, 396 U.S. 142, 1969), this Court examined the nature of a carrier's obligation to maintain the "status quo" during the pendency of a "major dispute" as to a proposed change in agreements, which were silent on the subject contained in the union's demand. In *Chicago & N. W. R. Co. v. United Transp. Union*, 402 U.S. 570 (1971), this Court decided that Section 2, First was designed to be a legal obligation enforceable through injunctive relief and obligated both railroads and unions to make and maintain agreements and to bargain in good faith during the formal procedures imposed by the Railway Labor Act. In this case, we ask the Court to determine the nature of a carrier's obligation to follow the notice and negotiation procedures of the Act, to bargain in good faith, and to refrain from unilaterally effecting changes in its employees' working conditions immediately following a settlement mandated by Congressional action. We also ask the Court to decide whether the carrier, on the basis of the allegations in the complaint and the evidence presented, violated the good faith bargaining requirements of the Act by unilaterally extending the incidental work rule to crafts not party to the negotiations or involved in the dispute before

Congress, when the carrier had specifically waived its right to bargain on that rule for a specific time and had withdrawn its demand for more extensive changes during the bargaining sessions. In sum, we are asking the Court to determine the questions left open in the *C. & N. W.* case; whether Section 2, First requires more than to avoid bad faith bargaining during negotiations, and whether certain parallel precedent evolved from the National Labor Relations Act (29 U.S.C. 151) is applicable to this Railway Labor Act case. *Id.* at 579, n. 11.

Since this is the first time that Congress itself has regulated the terms of a collective agreement through the adoption of an incomplete memorandum of understanding as part of the Act, which enactment was conceived as the termination of the labor dispute between the parties before it, and since this case involves the extent to which the railroad's duty to bargain in good faith obligates it to maintain agreements, there are no more important questions with respect to railway labor relations before the courts today. We therefore believe this matter deserves review.

1. The decision below is directly in conflict with applicable decisions of this Court. The court below held that the subject matter of this litigation was a "minor dispute" involving the meaning of several words contained in the incidental work rule attached to the understanding ininitialed by the parties. The court therefore concluded that the dispute was one for administrative determination by the National Railroad Adjustment Board under Section 3, First of the Act (45 U.S.C. § 153, First), and was nonjusticiable, p. A20, *infra*. Having decided that the incidental work rule was reasonably susceptible to Terminal's interpretation and application, the Court of Appeals did not consider whether the railroad had violated the good faith bargaining requirements of Section 2, First (45 U.S.C. § 152, First). See p. A33, *infra*. We submit this view is

BLEED THROUGH POOR COPY

contrary to the two separate but companion principles of railway labor law that have developed from a reading of the Act.

Construing the various provisions of the Act and the disputes handling procedures set forth therein, this Court has stated that "major disputes," *i.e.*, disputes over the *creation* of rates of pay, rules, or working conditions, are:

> ". . . disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945).

It is clear that the objective of a major dispute is to bring about a *change in or new* rates of pay, rules or working conditions. Therefore, contrary to the view expressed by the court below, from the test prescribed in the *E. J. & E.* case, and a reading of Section 2, Seventh and Section 6, an effort by either party to bring about a change in the terms of an existing agreement or to create a new agreement, either formally through the service of a Section 6 notice, or through unilaterally imposed changes in major conditions of employment, constitutes the establishment of a major dispute.

The courts, however, have had great difficulty in deciding, on the basis of the major-minor labels alone whether the notice and negotiation procedures must be followed in a particular case. Rather, each case has turned on matters of substance, and the final determination has depended on the court's view of what the carrier actually intended to accomplish. [8]

---

[8] *United Industrial Workers v. Galveston Wharves*, 351 F.2d 183, 188-189 (5th Cir. 1965); Harper, *Major Disputes Under the Railway Labor Act*, 35 J. Air L & Comm. 3, 16-17 (1969).

The court below apparently recognized the need to look at Public Law 91-226 and the initialed understanding but refused to make its findings in light of these facts: (1) the original Section 6 notices were served by only the four unions; (2) the carrier's notice was served jointly on the four unions only; (3) the negotiations were limited to the four unions; (4) the carriers initially withdrew portions of their proposals applicable to crafts represented by other unions; (5) only the four unions were parties before Emergency Board No. 176, and the references in the latter's report to the President referred to the work rules pertaining to the mechanics in the crafts involved before it; (6) the understanding was initialed by only the four unions; (7) the memorandum included wage increases for "mechanics" which were not applied automatically to other crafts; (8) the memorandum required withdrawal of the carriers' proposal to eliminate work classifications and to create a composite mechanic; (9) the carriers had an opportunity, after the memorandum had been rejected in the ratification process, to specifically include carmen but specifically refused this offer; (10) only the four unions were eligible to participate in the nation-wide strike prevented by Public Law 91-226; (11) the legislative history and specific language of the enactment establish that its provisions merely referred to the four unions involved in the dispute; and (12) the course of action ultimately taken by Terminal clearly contravened the basic provision of the System Federation agreement which continues to prohibit the use of employees in other crafts to perform electricians' work.[9] Furthermore, when viewed in its full breadth, this case concerns a dispute of major propor-

[9] The court below narrowly construed one sentence from the Public Law and two words from the memorandum. However, a proper understanding of their object and purpose can only be made by reviewing them in their entireties and in light of the factual background. See *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288 (1956).

BLEED THROUGH POOR COPY

tions, from both the standpoint that the Terminal's action ultimately leads to a reduction in jobs and the quality of existing jobs and also, as we later show, that the dispute transcends mere time claims which may be adjusted by money payments.

If the instant controversy is a major dispute, as we claim, it is clear that Terminal was required to follow the notice and negotiation procedures of the Act, and should have been enjoined from making the unilateral changes. In *Detroit & T. S. L. R. Co. v. Locomotive Firemen & Eng.*, 396 U.S. 142 (1969), this Court held that a railroad could not make unilateral changes during the pendency of a major dispute without violating the status quo provisions of Section 6 and that, pursuant to Section 2, Seventh, that carrier could not change the working conditions of its employees until the agreements had been altered or modified through negotiations. Moreover, the need to give advance notice as we urge here, and to negotiate on the change was precisely stated in *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), where this Court said, "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6."

Although the above decisions were expressly based upon Sections 2, Seventh and 6 of the Act, this Court appears to have rounded out the law and to have added a new dimension in railway labor relations when, in *Chicago & N. W. R. Co. v. United Transp. Union*, 402 U.S. 570 (1971), it held that Section 2, First imposes a legal obligation enforceable by injunctive relief which requires the parties "to exert every reasonable effort to make and maintain agreements." [10] In short, railroads and their em-

[10] In the *Shore Line* case, this Court found it unnecessary to determine the question whether the railroad had violated a duty to bargain in good faith (396 U.S. at 155, n. 23). On the

(Footnote continued on following page)

ployees' unions are obligated to bargain in good faith and are to avoid bad faith bargaining throughout the entire bargaining process. *Id.* at 574-575. The court below disregarded this contention though raised in the complaint (J.A. 6), and on brief and oral argument.

With this background, let us turn to the specific situation herein, viewing Sections 2, First and Seventh and Section 6 as being interrelated and integral parts of the overall scheme enacted by Congress. While this Court has noted on several occasions that parallels between the National Labor Relations Act and the Railway Labor Act must be drawn with the utmost care, we submit that the pronouncements of this Court under the former statute, and the rationale in support thereof, are equally applicable to the instant dispute. See *Chicago & N. W. R. Co. v. United Transp. Union,* 402 U.S. at 579, n. 11; *Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 383 (1969).

In *NLRB v. Katz,* 369 U.S. 736 (1962), this Court held that an employer violated the duty to bargain collectively by unilateral changes regarding matters on which it was negotiating with the union, even though no finding of subjective bad faith had been made by the Labor Board. In *Fibreboard Corp. v. NLRB,* 379 U.S. 203 (1964), the employer had determined to contract out the maintenance work at its plant immediately following the termination of the collective bargaining agreement, and refused to negotiate on a new or renewed agreement. Though finding the employer's motive to be economic rather than anti-union, the Board nevertheless found that the employer's failure to negotiate on contracting out this work constituted

---

(Continued from previous page)

basis of the *C. & N. W.* case, it is now reasonable to assume that such violation did occur. When viewed in the perspective of the *C. & N. W.* rationale, the many decisions in railway labor cases are more easily reconcilable.

BLEED THROUGH POOR COPY

a refusal to bargain in good faith. This Court agreed that the employer was required to bargain on the subject matter in dispute and sustained the Board's order ". . . restoring the status quo ante to insure meaningful bargaining . . ." *Id.* at 216.

Thus, by the time that *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1966), reached this Court, it was unequivocally clear that an employer governed by the National Labor Relations Act cannot unilaterally change wages, hours of employment or conditions of work "unless some provision of the contract authorizes him to do so." *Id.* at 425. The question presented was, therefore, limited to whether a contractual provision which "might" have allowed the employer to make the unilateral change in question would deprive the Labor Board of jurisdiction to determine if that provision "did," in fact, authorize the employer's action. Considering the history of the negotiations, as well as the express provisions of the collective agreement, the Board ruled that the union had not given the employer power to unilaterally change the wage system. [11] In that case, the agreement specified different hourly rates for different members of the crew and gave the employer the right to grant premium rates to any employee. The employer, however, placed all crew members on the same scale and made premium pay dependent upon the production of the crew as a whole. The Ninth Circuit held that the Board did not have jurisdiction, since the unfair labor practice of bad faith bargaining turned ". . . upon a good-faith dispute as to the correct meaning of the provisions of the collective bargaining agreement . . ." (351 F.2d 224, 228). However, the court of appeals did

---

[11] Unlike the court below, other courts have examined railroad labor disputes in the context of the history of the negotiations, the intentions of the parties, as well as the express provisions in the collective agreement. See, *e.g.*, *Illinois Central R. Co. v. Locomotive Engineers*, 443 F.2d 136 (7th Cir. 1971).

not decide that the Board's interpretation was incorrect.[12]

Reversing, this Court held that the unfair labor practice proceeding, though concerned with contract interpretation, involved a separate issue as to the employer's unilateral right to change rates of pay contrary to the statutory duty of collective bargaining. Therefore, the contract question did not remove the Board's power. Moreover, this Court held that the Board correctly concluded that the contested contractual provision did not grant the employer the right to institute the changes. *Id.* at 430-431.

The rationale of the above decisions under the National Labor Relations Act is equally applicable in this case. Like in the *C & C Plywood* case, petitioner is merely seeking to "enforce a statutory right which Congress

[12] The district court herein stated that the understanding "applied across the board" (J.A. 73, 75), *i.e.*, to any craft having "mechanics," which nomenclature, of course, includes journeymen in any of the 21 railroad crafts. This interpretation is clearly erroneous. Therefore, the court below took its turn at trying to interpret the language of the incidental work rule within its four corners, pp. A20-A24, *infra*. Although the rule affirmatively compels the mechanics of the signatory crafts to perform incidental work of another craft, it is silent in regard to the giving up of work jurisdiction to another craft (J.A. 24). Thus, the giving up of jurisdiction to incidental work must be implied to have taken place as to the signatories, and, as an implied condition, would necessarily be limited to the four unions, with the express prohibition against other participants still being maintained by reason of the System Federation agreement. The court below nevertheless found "the clear intent of the language used in the incidental work rule, to the extent that it was implemented by Public Law 91-226, requires personnel of the four signatory unions at running repair stations to perform incidental work in *all* the shop 'crafts' and also requires them to allow all the shop 'crafts' to perform incidental work in their 'craft,'" *infra*, p. A22 (Emphasis in original). On this basis, the court below stated that it would reach the same result as the district court, although the Adjustment Board was free to adopt a different approach. While we submit the interpretation of the court below does not follow, that court nevertheless failed to come to grips with the issues of good faith bargaining and lack of proper notice under Section 6, particularly in view of the fact that the parties never fully understood its terms in the sense it was ultimately applied by Terminal and in light of the method by which it was effectuated.

BLEED THROUGH POOR COPY

considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment — 'to provide a means by which agreement may be reached.'" *Id.* at 428. As in *Katz, supra* (369 U.S. at 747), the unilateral action taken by the employer "must of necessity obstruct bargaining, contrary to the congressional policy," in that the action taken by Terminal destroys the future ability to negotiate and to make and maintain agreements (J.A. 46-48). This same philosophy has been expressed by this Court in situations arising under the Railway Labor Act, when it has said that the policy of that Act "is to prevent the union from striking and management from doing anything that would justify a strike," *Shore Line, supra*, 396 U.S. at 150, and that "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute," *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966).

In short, the refusal of the lower courts to grant the requested injunctive relief has created an imbalance as to the equal power or status between the railroad and its employees' representative, a transgression in favor of the former not contemplated by the Act;[13] for, on the one hand, the union is required to bargain in all circumstances and cannot exercise economic self-help to adequately protect the economic interests of those employees represented by it, but the railroad can unilaterally change, and continue to change, working conditions (J.A. 47-48).

The court below nevertheless believed that IBEW had an adequate and sufficient remedy to protect those rights in a proceeding before an adjustment board. How-

[13] The kind of labor philosophy which evolves from the decision below has been severely criticized. *Rutland Ry. Co. v. Locomotive Engineers*, 307 F.2d 21, 42 (2nd Cir. 1962) (T. Marshall, J., dissenting).

ever, the court disregarded IBEW's claim that it "will suffer loss of its reputation to properly represent its membership against this kind of encroachment on said employees' rights" (J.A. 6), and evidence that its image "will be damaged beyond repair" and its membership "will look elsewhere to find someone to represent them" (J.A. 47-48). On precisely that ground, this Court upheld the Labor Board's jurisdiction and rejected the arbitration alternative in *C & C Plywood* (385 U.S. 429, n. 15), "for the real injury in this case is to the union's status as bargaining representative, and it would be difficult to translate such damage into dollars and cents." [14]

Having found jurisdiction of good faith bargaining matters under the Railway Labor Act to be in the federal courts, it is implicit that the judiciary could fashion appropriate relief. In fact, contrary to the opinion below, p. A20 *infra*, an adjustment board has no power to interpret Public Law 91-226,[15] and in interpreting and applying the contract, would not have authority to fashion a remedial order adequate to vindicate violations of the Act. See *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324 (1969); *cf. United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

It is for this reason, we believe, that this Court has stated:

> "[I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of that

---

[14] The status as bargaining representative was protected by injunctive relief in *Texas & N. O. R. Co. v. Railway Clerks*, 281 U.S. 548 (1929); and *Virginian Ry. v. System Fed.*, 300 U.S. 515 (1937). The injunctive relief in the instant controversy would have accomplished the same purpose.

[15] See *Detroit & T. S. L. R. Co. v. United Transp. Union*, 396 U.S. at 158-159; see also, *Locomotive Engineers v. Denver & R. G. W. R. Co.*, 411 F.2d 1115 (10th Cir. 1969).

BLEED THROUGH POOR COPY

agreement. Particularly since the collective bargaining agreement which the union sought to change was the result of mediation under the Railway Labor Act, this is the type of major dispute that is not governed by the Adjustment Board."[16] *Railroad Telegraphers v. Chicago & N. W. Ry. Co.*, 362 U.S. 330, 341 (1960).

Therefore, whether this case is viewed from the basis of Section 2, First or from Sections 2, Seventh and 6 of the Act, the pronouncements of this Court are equally applicable herein and lead to a result opposite of that rendered below.

2. The decision below also is contrary to decisions by other courts of appeals and by a district court.

a. The decision below conflicts directly with two decisions of the Sixth Circuit. In *Locomotive Firemen v. Detroit & T. S. L. R. Co.*, 421 F.2d 660 (6th Cir. 1970), *cert. denied*, 398 U.S. 927 (1970), the Sixth Circuit held that a railroad properly was enjoined from unilaterally abolishing the position of firemen on freight trains. The 1942 agreement between the parties required firemen on all diesels, but later contracts did not refer to the subject. Neither party served notice to revoke the agreement, and the railroad used firemen on all diesels to the extent required by arbitration Award 282 issued pursuant to Public Law 88-108. Under the Ohio full crew law, the carrier was required to use firemen an all freight runs on "main" tracks. However, the railroad revised its yards and re-

[16] Furthermore, unlike the situations presented in *NLRB v. Insurance Agents Int'l.*, 361 U.S. 477 (1960), and *Terminal R.R. Ass'n v. Railroad Trainmen*, 318 U.S. 1, 6 (1943), Congress did through Public Law 91-226 undertake governmental regulation of the rates of pay, rules, or working conditions. Under these circumstances, the statute did more than provide a means by which agreement could be reached. Jurisdiction over the mandated settlement would not be, therefore, in the Adjustment Board, but necessarily rests in the federal courts.

designated "main" tracks as "yard" tracks. The court rejected the carrier's argument that a 1953 contract superseded the agreement of 1942, that the redesignation of the tracks made the full crew law inapplicable, that the dispute had reduced itself into a question of the proper interpretation of the terms of the collective agreement, and that the courts therefore lacked jurisdiction. On the basis of this Court's decision in *Shore Line, supra,* 396 U.S. 142, the Sixth Circuit ruled that the district court had authority to enjoin the railroad's "unilateral self-help measures" until the status quo provisions of the Act had been exhausted. Similarly, in *United Transp. Union, Local 63E v. Penn Central Co.,* 443 F.2d 131 (6th Cir. 1971), *cert. denied,* 404 U.S. 938 (1971), the Sixth Circuit stated the carrier's unilateral change in the form of crew boards was not a mere dispute over the meaning of the language in the collective agreement. Upholding the status quo injunction, it held the dispute between the parties concerned an attempt by the defendant to change the very terms of the contract, and consequently the railroad's actions amounted to a change in working conditions and created a major dispute. Although both decisions are predicated on a reading of Sections 2, Seventh and 6, it is apparent that the ultimate rulings are more appropriately based upon the railroad's failure to comply with its duty to bargain collectively, a determination that an adjustment board could not make. In the case now before this Court, however, the union was denied such relief on the basis that the dispute was minor and an adjustment board could grant an adequate remedy. Thus, these decisions are squarely in conflict.

b. The decision below also is directly in conflict with two decisions of the Ninth Circuit, *Railway Conductors & Brake. v. Spokane, P. & S. Ry. Co.,* 366 F.2d 99 (9th Cir. 1966), *cert. denied,* 385 U.S. 1025 (1966); *Butte, A. & P.*

Ry. Co. v. Locomotive Firemen & Eng., 268 F.2d 54 (9th Cir. 1959), *cert. denied*, 361 U.S. 864 (1959). In those cases, the Ninth Circuit found major disputes to exist under factual circumstances comparable to those present here, and required those railroads to exhaust the notice and negotiation provisions of the Act. As here, the former case involved a hastily-drafted eleventh-hour memorandum. There, Congress had avoided a nationwide rail strike by an enactment requiring compulsory arbitration of two issues between the carriers and the unions. The remaining issues were the subject of a so-called "White House Agreement." When subsequently the parties could not agree on the meaning of "suitable lodging" and "an equitable allowance in lieu thereof", terms incorporated in the mediated agreement, the railroad, as did Terminal in this case, unilaterally placed into effect *its interpretation*. As a result of the union's threatened strike, the carrier submitted the matter to the Adjustment Board and sought an injunction against the strike. Though recognizing the dispute could have been submitted to arbitration, the Ninth Circuit did not believe that the very loose and general language of the "White House Agreement" was readily interpretable, and found the dispute would be more appropriately handled under the major dispute procedures of the Act. The factual conditions in the instant case lead to the same inescapable conclusion — the parties had never completed the major dispute procedures as to the subject matter involved and Terminal cannot now abandon those procedures through the unilateral extension of Public Law 91-226. A reading of those opinions reveals that the Ninth Circuit believed the railroad had violated its duty to bargain collectively. Those decisions are contrary to the decision below.

c. The decision below also is contrary to two decisions of the Eighth Circuit. In *Rolfes v. Dwellingham*,

198 F.2d 591 (8th Cir. 1952), Section 6 was found to have been violated by the railroad's failure to serve the notice required by that section before displacing waiters by dining car stewards. And in *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964 (8th Cir. 1967), the Eighth Circuit enforced the Labor Board's order finding that the employer had violated its duty to bargain by unilaterally reducing wages despite the employer's reliance upon an interpretation of the collective bargaining agreement to justify its action. Recognizing the need to implement the union's rights along with preserving express statutory rights, the court concluded "the presence of a contract provision for both grievance procedure and arbitration does not eliminate Board jurisdiction of an unfair labor practice . . . ." *Id.* at 970. In that Terminal failed to serve notice and in that the duty to bargain prevents unilateral action notwithstanding that the dispute could be arbitrated, these decisions are irreconcilable with the determination below.

d. In the Fifth Circuit also the justiciability and enforcement of claims under Section 2, First is clearly established. In *United Industrial Workers v. Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), the Fifth Circuit found the dispute involving the non-discriminatorily motivated lease of certain facilities to another company during the life of the bargaining contract was a major dispute as to which the carrier had thereby effected a change in working conditions in violation of Section 2, Seventh, and as to which the carrier was required to give the union notice pursuant to Section 6. Moreover, the Fifth Circuit determined, contrary to the decision below, that no outside tribunal, such as an adjustment board, has the authority to consider violations of those statutory provisions.

e. The Court of Appeals for the Seventh Circuit has also held, following this Court's decision in *Shore Line*,

supra, that a railroad may not change existing conditions of work unilaterally. *Illinois Central R. Co. v. Locomotive Engineers*, 422 F.2d 593 (7th Cir. 1970). In that case, the carrier over protest of the union established a program to have supervisory personnel ride in the cabs of locomotives, who would require the locomotive engineers to relinquish the controls, turn over to trainees operation of the locomotive, and subject the engineers to discharge for refusing to do so. The court found that the change gave rise to the negotiation and mediation processes of the Act. On that basis, the Seventh Circuit affirmed the denial of injunctive relief to restrain the Brotherhood from striking over the carrier's unilateral action. If a union is entitled to strike under such circumstances, an injunction against the railroad's action, as requested in this case, would also further the Congressional purposes set forth in the Act. Clearly, the two decisions are therefore in conflict.

f. In addition, the decision below conflicts directly with two decisions of the Second Circuit. In *Manning v. American Airlines*, 329 F.2d 32 (2d Cir. 1964), *cert. denied*, 379 U.S. 817 (1964), the court affirmed the district court's order enjoining the airline from unilaterally discontinuing union dues checkoff even though the checkoff agreement had expired. The air carrier was required to continue all working conditions until changed pursuant to the notice and negotiation provisions of the Act. Although this decision refers to Section 6, it is apparent that the ruling is based on the court's view of the duty to bargain in good faith. In holding that the airline was required to serve notice and to negotiate before making the desired changes, the court concluded:

> "The purpose of Section 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted . . ."

Under the decision below, however, the carrier may make changes in major conditions of employment without compliance with the mandatory provisions of the Act.

And in a more recent decision, *Seaboard World Airlines v. Transport Workers*, 425 F.2d 1086 (2d Cir. 1970), the Second Circuit held Section 2, First to be enforceable by injunction. There the carrier refused to bargain on the union's attempted reopener on the basis that the collective agreement contained a permanent prohibition on the subject of the demand. Although finding the union's strike over this refusal to have been properly enjoined temporarily, the Second Circuit modified the injunction by eliminating the lower court's referral of the matter to an adjustment board and in lieu thereof provided for prompt determination of the union's claim of illegality by the district court.

g. In addition, the decision below is contrary to the direction taken in a district court case, which as far as we have been able to ascertain, is the only other case in which a declaration was requested on the question whether a settlement mandated by Congress applied to a particular group of employees or to a specific railroad. In *Locomotive Engineers, Div. 700 v. Arbitration Bd. 282*, 223 F. Supp. 377, 244 F. Supp. 336 (D.D.C. 1963), the district court for the District of Columbia held that the courts have exclusive jurisdiction to determine this issue. After reviewing the factual background and the legislative proceedings, the district court held that neither the railroad nor its employees were parties to the dispute with which Congress was concerned, although the same bargaining subjects were involved, and that they were not parties to the controversy over which the arbitration tribunal had jurisdiction.

3. The decision below also is contrary to the long-standing application of the good faith bargaining provisions of the National Labor Relations Act by the National Labor Relations Board. Again recognizing the limitations upon the reading of that Act in Railway Labor Act cases, we nevertheless believe that those decisions merit consideration in the instant case for the Labor Board has been faced with the question presented here many times in the past in performing its duties.

For example, in *Unit Drop Forge Div., Eaton, Yale & Towne*, 171 NLRB No. 73 (1968), *enforced*, 412 F.2d 108 (7th Cir. 1969), the Board held the employer had acted unilaterally in derogation of its duty to bargain collectively by changing its method of operation thereby reducing its employees' earnings. Although the employer contended that the collective agreement with the union "sanctioned" its unilateral actions, the Board found the union had not waived its right to notice of and negotiations on the changes merely because the agreement provided that each party waived its right to bargain collectively on any subject, whether or not referred to in the agreement or within the knowledge or contemplation of the parties at the time of negotiations. Moreover, the existence of a grievance-arbitration procedure in the agreement did not indicate a waiver, nor did the availability of those procedures preclude the Board from asserting jurisdiction over the employer's unfair labor practice. The Board's decision appears to have been based on its conclusion that the controversy was not beyond its competence to resolve and, if left unresolved, might have a continuing impact on the bargaining relationship. Unlike the court below, the Board was unwilling to withhold its determination and to send the parties elsewhere. Therefore, it fashioned a meaningful remedy suited to the practical needs of the situation.

And, in *Standard Oil Co. (Ohio)*, 174 NLRB No. 33 (1969), the Board held that an employer unlawfully discredited the union and impaired the bargaining process by unilaterally publishing and implementing terms and conditions of employment inconsistent with an existing collective agreement. Though the agreement provided for its reopening and the employer argued that its unilateral action was justified since the union refused to agree to the changes in negotiations on the employer's reopener, the Board held the employer was not entitled to change the pre-existing commitments during the contract term.

The Board's decisions abundantly establish two principles applicable herein. First, there is no duty upon either party to bargain about proposals to make changes in a collective agreement that would take effect during its term. See Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1110-1116 (1950). Second, the statutory right of employees to bargain collectively, through representatives of their choosing, may be waived, but only if explicitly contained in an existing agreement reached after genuine collective bargaining and if clearly and unmistakably established. See NLRB, 29th Ann. Rep. (1964) pp. 78-79; 30th Ann. Rep. (1965), pp. 77-78.

In the instant case, the understanding unequivocally establishes that neither party was obligated to bargain prior to January 1, 1970 upon any proposed change in the subjects referred to in the understanding or on any subject, directly or indirectly, referred to in the parties' initial demands. In fact, the carriers, including Terminal, had agreed to withdraw their demands for a composite mechanic and to merge the work classifications of all of the shopcrafts (J.A. 20, 26). Moreover, the parties understood that any agreements would be a full disposition of

BLEED THROUGH, POOR COPY

those proposals, and the working conditions created would remain in effect "until changed or modified in accordance with the provisions of the Railway Labor Act" (J.A. 26). If anything, the dispute, as to which the instant problem is a part, was a continuing one, and neither party understood that it had been resolved in the fashion that Terminal's action later took. Under the rationale of the Board decisions, the subsequent unilateral actions of Terminal, in the context of these circumstances, is surely disruptive of the bargaining processes and, conversely, is not conducive to the avoidance of any interruption to commerce. *Chicago & N. W. R. Co. v. United Transp. Union,* 402 U.S. at 576.

4. Moreover, we think it reasonably clear on the face of the Railway Labor Act that the decision below was in error—i.e., that Sections 2, First and Seventh, and 6, when read as a whole, mean exactly what they say. Therefore, all carriers have a duty to "maintain" agreements in order to avoid the interruption of commerce; and conversely shall not change working conditions except by agreement or after fulfilling the notice and negotiation requirements contained in Section 6. Nothing can be more disruptive of the legislative scheme, and can create greater turmoil among the rank and file, than to permit the railroad to unilaterally change major conditions of employment. It is a well known fact that precipitous changes made by management in rules of employment or working conditions are frequently the cause of serious disputes between labor and management, and lead to strike threats and strike action.

The unilateral action of Terminal establishes only its impatience with the long and drawn out features of the Act, which were purposely inserted to prevent freewheeling action by either of the parties. The take it or leave it attitude of Terminal also sustains the conclusion that

it acted in disdain of the authority of the bargaining representative, which could only serve to reduce the latter's influence in the shop and cause its members to look elsewhere for representation. As this Court said in *NLRB v. Insurance Agents' Int'l.*, 361 U.S. 477, 484-485 (1960), "the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union." Thus, the relationship of the railway union to the bargaining process is a continuing one, and is not limited to the execution of agreements, when management sees fit to follow that process, but not so when management decides to act unilaterally during the period prior to the next round of negotiations. In view of Congressional involvement in railroad labor disputes, and there is no indication this practice will be terminated in the near future, these problems will undoubtedly disturb labor relations in the railroad industry until the full status and function of the railway labor union is settled by this Court.

We respectfully submit that this case warrants review by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

HAROLD A. ROSS
1548 Standard Building
Cleveland, Ohio 44113

E. VICTOR WILLETTS, JR.
E. P. BAKER
1209 Ring Building
1200 Eighteenth Street, N. W.
Washington, D. C. 20036

Counsel for Petitioner

Of Counsel:

ROSS & KRAUSHAAR
1548 Standard Building
Cleveland, Ohio 44113

SCRIBNER, HALL, THORNBURG & THOMPSON
1209 Ring Building
1200 Eighteenth Street, N. W.
Washington, D. C. 20036